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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DENNY LAKE (also d/b/a JD United,
U.S. Crush, Advocacy Department,
Advocacy Division, Advocacy
Program, and Advocacy Agency);

CHAD CALDARONELLO (a/k/a

Chad Carlson and Chad Johnson),

individually and as an officer of C.C.

Enterprises, Inc.; C.C.

ENTERPRISES, INC. (also d/b/a

HOPE Services, Trust Payment

Center, and Retention Divisions);

DEREK NELSON (a/k/a Dereck

Wilson), individually and as an officer

of D.N. Marketing, Inc.; D.N.

MARKETING, INC. (also d/b/a

HAMP Services and Trial Payment

Processing); BRIAN PACIOS (a/k/a

Brian Barry and Brian Kelly); JUSTIN

MOREIRA (a/k/a Justin Mason, Justin

King, and Justin Smith),

Defendants, and

CORTNEY GONSALVES,

Relief Defendant.

Case No. SACV 15-0085-CJC-(JPRx)

**PLAINTIFF'S REPLY IN
SUPPORT OF A PRELIMINARY
INJUNCTION AGAINST
DEFENDANT DENNY LAKE**

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INTRODUCTION

On April 16, at the Temporary Receiver's invitation, FTC investigators and forensic experts copied information located at Defendants' business premises. This new evidence confirms the FTC's two core allegations: (1) HOPE Services steals homeowners' mortgage payments; and (2) Defendant Denny Lake knowingly aids and abets that theft.

Although all the other individual Defendants have stipulated to Preliminary Injunctions ("PIs"),¹ Defendant Lake asserts two primary arguments against a PI—both of which are factually wrong and legally irrelevant. First, Lake denies that he "assist[ed] HOPE Services in the collection of improper advance fees[.]"² Factually, this is false. The new evidence proves beyond doubt that Lake helped HOPE Services collect illegal advance fees.³ Moreover, Lake's contention is legally irrelevant, because the "assisting and facilitating" provision does not require a causal or direct connection between the assistance and the violation.

Second, Lake pleads that the Court's asset freeze is "disproportionate to [his] culpability."⁴ Factually, Lake is wrong again. As discussed below, Lake's culpability is substantial because he actively assisted the thefts. Lake's contention is also legally irrelevant. At the PI stage, the likelihood of Lake's liability is what determines whether the freeze should continue, not his "culpability." The FTC has already proven a substantial likelihood of success, and the new evidence shows that Lake is highly culpable. Therefore, the proposed PI (including an asset freeze) is appropriate.

¹ The two corporate defendants have not answered or otherwise opposed the FTC's motion for a Preliminary Injunction with respect to them. Accordingly, we ask the Court to enter PIs against them (proposed orders are attached).

² Joint Status Report (DE59) (May 7, 2015) at 1.

³ Except where the context requires greater specificity, we refer to HOPE and HAMP Services collectively as "HOPE Services." See TRO Mem. at 3-5.

⁴ Joint Status Report (DE59) at 1.

NEW EVIDENCE PROVING LAKE'S ROLE AND KNOWLEDGE

A. New Evidence Concerning Lake's Knowledge

During the immediate access, the FTC located significant additional evidence that Lake knew how HOPE Services induced trial payments.⁵ Specifically, as the FTC's TRO Memo explains, HOPE Services sends paperwork to homeowners "approved" for loan modifications, including a term sheet detailing their new loans and the dates when trial payments are due. *See* TRO Mem. at 12-13. On February 27, 2014 (around the time the fraud began), Lake emailed Pacios and Caldaronello: "Here is something similar to what you are doing that is more honest and compliant." Ostrum 2 ¶13:1 at 48-50. Lake attached alternative paperwork that differed from what HOPE Services ultimately used.⁶ Most important, Lake's somewhat "more honest" alternative did not represent that the homeowner has a government-backed modification agreement with his lender contingent upon making three trial payments. Significantly, however, Lake knew HOPE Services was not using the "more honest" variant, or anything like it.

Only two weeks later, another victim communicated to Lake about the payments. In fact, Lake reported to Pacios that a homeowner HOPE Services referred to Advocacy Department "wondered why they needed to do an interview [with Advocacy Department] since they were already approved and had been making payments to the bank." Ostrum 2 ¶13:1 at 55. Lake cautioned Pacios that

⁵ During the immediate access, FTC forensic experts and investigators collected information, including forensic images of certain computers and cellphones. Declarations from nine forensic experts, investigators and eDiscovery specialists are attached hereto. *See* Ostrum 2, Pickerrell, Huettner, Kaplan, Brown, Patel, Johnson, King, and Sutton.

⁶ *Compare* Ostrum 2 ¶13:1 at 49-50 *with id.* ¶14:2 at 139 *and id.* ¶15:3 at 140. Notably, however, Lake's "more honest" alternative is still deceptive and comes nowhere close to complying with the MARS Rule; it is merely less deceptive than the one that Lake gently suggested revising.

1 “leading people to believe they are paying the bank directly is not a recipe for long
2 term success.” *Id.*

3 Indeed, over the next year, multiple “clients” HOPE Services forwarded to
4 Lake repeatedly informed him that they believed their trial payments had already
5 secured a loan modification.⁷ These communications further prove Lake knew
6 about the illegal payments. For instance, one consumer emailed Lake: “I was told
7 [] I was approved for a loan . . . with a reinstatement fee and 3 monthly trial
8 payments to establish my loan.” Ostrum 2 ¶13:1 at 111. Lake told Pacios and
9 Caldaronello that he “tried to smooth things over” with this victim. *Id.* In another
10 email to HOPE Services, Lake noted that a homeowner “was under the impression
11 that the payments were going directly to Chase [her lender],” and was “panicking.”
12 Ostrum 2 ¶13:1 at 91. In his subject line, Lake informed Pacios and Caldaronello
13 that this homeowner “needs to be talked off the ledge.”⁸ *Id.*

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17 ⁷ This evidence refutes Lake’s claim that “[t]he service of the TRO in this
18 matter on Lake was the first instance that he learned of the practices of Pacios
[and] Caldaronello[.]” Opp. at 7.

19 ⁸ Indeed, many Lake emails contain reports from consumers from whom
20 HOPE Services had stolen payments. For instance, Lake warned HOPE Services
21 about a “PROBLEM file”: “We [Advocacy Department] just got a call from the
22 Nationstar Fraud department, they claim that [their mortgagor] contacted them and
23 believes he is approved with Nationstar and that he has paid funds to Nationstar
24 through [HOPE] Services.” Ostrum 2 ¶13:1 at 95. In another email to Pacios and
25 Caldaronello (subject: “Richard Kelly—red flags”), Lake relayed that a
26 homeowner stated “he was already approved and he already sent over the
27 paperwork so why would he need to talk to me [Lake]. . . . [I] wanted to give you
28 a heads up that this could be an issue[.]” *Id.* at 103. In yet another email (subject:
“Tatyana Boltyansky problem”), Lake warned that Boltyansky “asked about the
payments the lender had already received and [the] lender said no payments were
received—Tatyana then sent over the [HOPE] approval to [the] bank and they told
her not legitimate, etc.” *Id.* at 72. Another time, Lake reported that a homeowner
informed her lender (Wells Fargo) that “she is already approved for a trial payment
through HOPE and Wells said she was not. . . . [T]hey have opened an
investigation.” *Id.* at 66. Lake asked Pacios and Caldaronello to call the
homeowner “so we can get ahead of this.” *Id.*

1 Significantly, although Lake knew from the outset that HOPE Services was
2 simply stealing payments, there is no evidence that Lake ever informed any of
3 these victims what had transpired. Indeed, as discussed below, he did everything
4 he could to ensure victims continued to pay HOPE Services.⁹

5 **B. New Evidence Concerning Lake's Substantial Assistance**

6 As the TRO Memo explains, Lake helped keep payments coming by
7 creating the impression that the modification process HOPE Services allegedly
8 initiated was continuing, and by filtering lender communications that would
9 otherwise reveal the theft to homeowners. *See* TRO Mem at 38-39. Additionally,
10 new evidence establishes that Lake provided substantial assistance in at least six
11 other respects.

12 First, Lake actively worked to encourage or facilitate payments. For
13 instance, even when Lake apparently obtained some form of modification for a
14 victim, he still worked to structure the genuine trial payment process to make
15 HOPE Services' continued theft possible. In a particularly telling email exchange,
16 HOPE Services "loan counselor" Michael Paquette (a/k/a Mike Richards) emailed
17 Lake (with a copy to Pacios). Ostrum 2 ¶13:1 at 56. Paquette explained that
18 HOPE Services had set up a second "trial payment" for a homeowner due on April
19 7, but his lender's (genuine) trial mortgage payment was due on April 1. *See id.*

20
21 ⁹ Additionally, although ignorance of the law is not a defense, Lake knew
22 that advance fees were illegal. Lake met at length with the Receiver's deputies,
23 and he admitted "that there really isn't a way to do [his] business legally" without
24 involving an attorney. Receiver's Report (DE64) at 15. Notably, in early 2014,
25 Lake wrote: "[A]s a general rule only Attorneys are eligible to charge an advance
26 fee. . . . [T]echnically California law forbids the collection of advance fees for
27 ANYTHING relating to modification[.]" Ostrum 2 ¶21:9 at 307-308.
28 Furthermore, when terminating his relationship with an earlier entity that generated
modification business for Lake, he alleged that the entity's principal was
"engaging in an illegal business. You accepted close to 2 million dollars in
advance fees from homeowners[.]" Ostrum 2 ¶27:14 at 365; *see also id.* ¶13:1 at
124 (complaining that mediators "immediately cry foul if they hear that someone
has paid an advance fee").

1 As Paquette explained, the homeowner “cannot pay both payments and we were
 2 hoping to collect at least 1 more payment from him this month in order for this file
 3 to make a little more sense for everyone.” *Id.* In response, Lake promised to
 4 contact the lender and “see if the first [real] payment can be pushed out to May 1.”
 5 *Id.* This would enable HOPE Services to steal another payment before the
 6 homeowner began the genuine trial payment process.

7 To provide another example in which Lake encouraged payments,
 8 Caldaronello explained to Lake that a victim had his (fake) trial payment “coming
 9 up and [he] is a little nervous. The bank called him and told him it was a scam. . . .
 10 I really need you [Lake] to speak with him and reassure him that all is good.” *Id.*
 11 ¶13:1 at 119. Lake agreed to do so. *Id.* In ways like this, Lake encouraged
 12 homeowners to make additional payments HOPE Services could steal.¹⁰

13 Second, Lake helped HOPE Services by assuaging homeowners’ concerns
 14 when they arose. For instance, Lake asked Pacios to call a homeowner because he
 15 “is kind of freaking out and wanting to know where his money went, etc. . . . We
 16 did our best to calm him down and explain what was going on but he requested a
 17 call from [you].” Ostrum 2 ¶13:1 at 63 (subject: “Joseph Watson—needs a call”).
 18 In another case, Pacios explained to Lake that a homeowner’s “attorney said our
 19 paperwork was not authentic.” Ostrum 2 ¶13:1 at 97. The homeowner remained
 20 “on board,” but Pacios asked Lake to call her because she “needs a little
 21 reassurance and hand holding[.]” *Id.* Lake confirmed that Advocacy Department
 22 would reach out to her. *Id.* Of course, by reassuring victims that nothing was
 23 wrong, Lake helped keep payments coming.

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 26 ¹⁰ In another case, Pacios asked Lake for help because the victim was
 27 “giving a lot of push back to make a payment because he is still getting calls from
 28 lender saying they have nothing on file.” Ostrum 2 ¶26:13 at 363. Pacios asked
 Lake to contact the lender, to keep the victim “happy and in [the] process.” Lake’s
 response: “Good idea. On it.” *Id.*

1 Third, Lake helped “prepare” victims for appearing at foreclosure
 2 proceedings without attracting potentially problematic attention. Specifically,
 3 Lake instructed a HOPE Services employee what to tell a homeowner facing a
 4 foreclosure-related court appearance: “As part of the court date they ask if [the]
 5 client paid a third party—when the client says yes, someone at the court will
 6 ALWAYS tell them they should not have done so—we try to prep them for this if
 7 we are doing talking points but that is what you should address when you talk to
 8 this guy[.]” Ostrum 2 ¶13:1 at 61. This is yet another way that Lake helped
 9 conceal the fraud.

10 Fourth, Lake helped hide Pacios and Caldaronello from their victims. As the
 11 Court is aware, in late 2014, HOPE Services became “HAMP Services,” “Brian
 12 Barry” became “Brian Kelly,” and so forth. *See* TRO Mem. at 3-5. Lake also
 13 knew this. *See infra* at 10 n.18. Yet when HOPE Services’ victims asked Lake for
 14 help reaching HOPE Services, he lied to them. In one instance, Lake wrote to a
 15 victim: “As far as the application of your payments, all we can do is try to contact
 16 Chad Carlson on your behalf. We are a third party and have no knowledge or
 17 involvement in fees paid or application of funds. . . . [T]here is little
 18 communication between their office and ours at this time. They have instructed
 19 me to give you [an] address and you can send them a written request[.]”¹¹ In this
 20 way as well, Lake perpetuated the fraud by covering for HOPE Services.

21 Fifth, Lake informed HOPE Services when it needed to call particular
 22 homeowners who might learn that they were victims. In one instance, after
 23 speaking with both his lender and the government, a victim called Lake, “was
 24 upset and repeatedly said we were part of HAMP services’ ‘scam.’” *Id.* ¶13:1 at
 25 107. Lake warned Pacios that this “guy needs a call.” *Id.* In another case, through
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27 ¹¹ Lake similarly instructed his employees to direct HOPE Services’ victims
 28 with questions to call an old HOPE Services number, or to send mail to an old
 HOPE Services maildrop. Ostrum 2 ¶17:5.

1 an email to Pacios and Caldaronello (subject: “please resolve this”), Lake warned
 2 that a homeowner had “sent your paperwork to HUD,” where it “set off red
 3 flags.”¹² *Id.* at 77. Through emails like these, Lake alerted HOPE Services to
 4 “problems” they needed to solve, thereby keeping the fraud going.

5 Sixth, as the FTC’s TRO Memo explained, Lake assisted the fraud simply
 6 by failing to disclose to victims that he knew their supposed “trial payments” never
 7 reached their lenders. *See* TRO Mem. at 38. In fact, victims inundated Lake with
 8 requests that he explain what happened (or was happening) to their payments, but
 9 Lake usually deflected these questions back to Pacios and Caldaronello. *See, e.g.,*
 10 Ostrum 2 ¶13:1 at 121 (subject: William Friedrich—PROBLEM”) (“Client is
 11 upset at [Caldaronello] and feels he was misled and wants [a] call regarding funds
 12 paid.”).¹³ Lake also instructed his employees to conceal information about HOPE
 13 Services’ trial payments: “if someone wants to discuss funds paid do not engage . . .

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 16 ¹² Lake urged them to “get a refund out,” apparently hoping to avoid
 17 regulatory attention. *See* Ostrum 2 ¶13:1 at 77. Lake’s employees also knew the
 18 drill. When a consumer “question[ed] the three trial payments and their
 19 legitimacy,” the employee asked Lake to “have one of the guys at hope give him a
 20 call[.]” *Id.* at 73. Lake forwarded the message to Pacios and Caldaronello.” *See*
 21 *id.* Additionally, when Lake learned that two homeowners hired an attorney and
 22 contacted regulators, he texted Caldaronello about this “major fire” and asked him
 23 to address it. *Id.* ¶13:1 at 94. In another email, Lake told Pacios and Caldaronello
 24 that a homeowner “called here serval times and wants to know where her money
 25 went, what is going on etc etc.” *Id.* ¶13:1 at 76. Lake’s subject line read: “Sandra
 26 Ramirez off the rails—must get a call.” *Id.*

27 ¹³ *See also* Ostrum 2 ¶13:1 at 69 (Lake to Pacios and Caldaronello; “Called
 28 client to go over the approval, new payment of \$1252 with three trial payments.
 Client insists she already made her trial payments (to you guys) and wants to know
 where the money went.”); *id.* at 67 (Lake to Pacios and Caldaronello; subject:
 “James Cull needs a call”; homeowner called “with a Wells Fargo rep on the line
 and was asking a lot of questions about his Wells Trust account. The rep was
 telling him they did not have these funds[.]”); *id.* at 62 (Lake to Pacios and
 Caldaronello; “he is concerned about where his payments are going and would like
 someone at HOPE to give him a call”); *id.* at 64 (Lake to Pacios; “they would like
 you to explain how and where their funds were applied”); *id.* at 71 (Lake asking
 Pacios and Caldaronello to address the homeowner’s question: “[w]hat happens to
 the 3 payments of \$901 that we made to the trust account??”).

1 . we do not have any direct knowledge or information regarding payments, how
2 they are applied, etc.” *id.* ¶16:4at 143. By hiding HOPE Services’ theft, monthly
3 “trial payments” continued, and Lake greatly exacerbated the injury.

4 **C. New Evidence Concerning Lake’s Substantial Assistance**

5 During the immediate access, the FTC also located new evidence connecting
6 Lake and Pacios. Notwithstanding Lake’s sworn claim that he “was introduced to
7 ‘Brian Barry’ and ‘Chad Carlson’ in January 2014,” Lake ¶7, Lake met Brian
8 Pacios (by his real name) in January 2014, shortly before the HOPE Services fraud
9 began. Significantly, Lake had a “close personal friend,” Barry Gabster, who sold
10 mail marketing.¹⁴ In January 2014, Lake emailed Gabster: “[S]ome guy I didn’t
11 know had been calling me about [Advocacy Department] Turns out . . . the
12 guy is **Brian Pacios**.” Ostrum 2 ¶22:10 at 311 (emphasis added). Pacios and Lake
13 planned to meet “about doing back end for a friend [that Pacios] is doing a small
14 shop with. Might be some marketing \$ for Barry [Gabster]??”¹⁵ *Id.* Subsequently,
15 as Gabster explains, “companies Pacios worked for hired [him] to send out loan
16 modification advertisements.” Gabster ¶4. Both Gabster and Lake knew that
17 “Pacios’ mailers were designed to generate phone calls to the company or
18 companies with which Pacios was associated, and that the mailers advertised loan
19 modifications.” *Id.* ¶6. Lake further “knew that Pacios was forwarding clients
20 who called to Lake’s ‘Advocacy Department.’” *Id.* Thus, Lake and Pacios
21 coordinated from the outset.

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25 ¹⁴ Gabster worked alongside Lake at a law firm placed into receivership for a
26 scam marketed to distressed homeowners. *See* TRO Mem. at 13 n.43; Gabster
27 ¶¶1-2. Gabster then rejoined Lake at Advocacy Department, sometimes referring
28 to himself as its “vice-president.” Gabster ¶3. In 2013, however, Gabster departed
and began a business “help[ing] companies send out” mailers. *Id.* ¶4.

¹⁵ Pacios’ “friend” was presumably Chad Caldaronello, whose “small shop”
was C.C. Enterprises (HOPE Services).

1 Gabster worked with Pacios over the next year to help him send mailers.
 2 Initially, Gabster's work-related emails went to "Brian Barry" (of HOPE Services).
 3 Ostrum 2 ¶23:11 at 312-18. Later, Gabster's emails went to "Brian Kelly" (of
 4 HAMP Services). *Id.* at 344-56. In fact, in late October 2014—roughly when
 5 HOPE morphed into HAMP—Gabster sent the same email about marketing to both
 6 "Brian Barry" and "Brian Kelly." *Id.* at 342. Also during this period, Gabster
 7 continued his close relationship with Lake, and they sometimes discussed business
 8 "[w]hen [they] communicat[ed] socially[.]"¹⁶ *Id.* ¶5. In short, contrary to Lake's
 9 claim,¹⁷ Lake and Pacios had a close connection throughout the HOPE Services
 10 fraud.¹⁸ This underscores that Lake knew (or consciously avoided knowing)
 11 exactly what HOPE Services did.

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 15 ¹⁶ Lake also likely knew that HOPE Services' mailers advertised
 16 modifications, not his amorphous "advocacy" services. Although Gabster denies
 17 Lake knew "exactly" what the advertisements said, *see* Gabster ¶7, even if one
 18 credits this aspect of his declaration, Lake's alleged failure to inquire as to what the
 19 mailers marketed is conscious disregard for what the advertising claimed.

20 ¹⁷ *See* Lake ¶7; *see also* Opp. at 6 (presumably relying on Lake's sworn
 21 declaration to assert that "Lake did not even know the true names of Brian Pacios
 22 and Chad Caldaronello until recently."). This is not Lake's first (or second)
 23 perjury. *See* TRO Mem. 44-45.

24 ¹⁸ Lake also implies that he did not know Pacios and Caldaronello were
 25 involved with HOPE Services' successor (HAMP Services). *See id.* ¶¶18-19
 26 (stating that Pacios and Caldaronello advised him that "a friend of theirs" would
 27 open HOPE Services' replacement, and that they would open a separate business);
 28 However, Lake's communications prove he knew Barry, Kelly and Pacios were the
 same person, and that Carlson, Johnson and Cardaronello were also the same
 person. Significantly, Lake texted Caldaronello about loan modification issues at
 the same telephone number during both Caldaronello's "Chad Carlson/HOPE
 Services" period, and during his later "Chad Johnson/HAMP Services" period.
 Ostrum 2 ¶25. Likewise, Pacios' cellphone records show numerous calls between
 Lake and Pacios during both Pacios' "Brian Barry/HOPE Services" period, and
 during his later "Brian Kelly/HAMP Services" period. *Id.* Additionally, the fact
 that Lake and Pacios coordinated from the beginning further belies Lake's claimed
 ignorance. *See supra* at 9-10.

ARGUMENT

I. Lake Substantially Assisted HOPE Services' Theft.

A. There Is No Causation Requirement.

Lake's primary legal argument on the merits is that the MARS Rule's "assisting and facilitating" provision contains an implied causation element. *See* Opp. at 9 (claiming that "Lake's advocacy process does not result in HOPE's violation of the MARS Rule," and that he could not have assisted violations because they (allegedly) occurred before he took any action). However, 12 C.F.R. § 1015.6 does not contain a causation requirement, and if one were intended, the regulation would include it expressly.¹⁹ In fact, the Notice announcing the Final Rule specifically identified Lake's activity—the "back-end handling of consumer files"—as conduct that could qualify as "substantial assistance." 75 FED. REG. 75091, 75123 (Dec. 1, 2010). Because the "back-end handling of consumer files" could not cause, for instance, the misrepresentations that the MARS Rule prohibits, the Commission's Notice further underscores the absence of any causation requirement in § 1015.6.

Additionally, § 1015.6 is identical to the TSR's assisting and facilitating provision. When rejecting an argument in a TSR appeal similar to the one Lake advances here,²⁰ the Tenth Circuit noted that the Commission originally proposed

¹⁹ In fact, the Telemarketing Sales Rule ("TSR") is analogous to the MARS Rule in some respects, and—although certain TSR provisions contain a causation requirement, *see, e.g.*, 16 C.F.R. § 310.4(b)—the TSR's identical assisting and facilitating provision also does not have a causation element, *see id.* § 310.3(b). Notably, one court used the difference in language between these two TSR provisions to conclude that the Commission "did not intend to limit the scope of the plain meaning of the verb 'cause'" where it did appear. *See United States v. Dish Network, L.L.C.*, 667 F. Supp. 2d 952, 958 (C.D. Ill. 2009).

²⁰ *FTC v. Chapman*, 714 F.3d 1211, 1216 (10th Cir. 2013) ("Ms. Chapman argues her actions did not constitute substantial assistance under the [TSR] because she was not involved in the marketing efforts and thus her assistance was not directly connected to the misrepresentations made to consumers. However, this type of direct connection is not required.").

1 that the assistance be “related to” the unlawful act, *see* 60 FED. REG. 30,406,
 2 30,414 (June 8, 1995), but it removed that limitation in the Final Rule, *see* 60 FED.
 3 REG. 43,842, 43,851 (Aug. 23, 1995). *See Chapman*, 714 F.3d at 1216. In fact,
 4 two courts have found parties liable for “assisting and facilitating” even when they
 5 did not assist until after the violations occurred. *See id.* (holding individual liable
 6 who provided the materials that were sold, but did not market them herself); *FTC*
 7 *v. HES Merch. Servs. Co.*, No. 6:12-CV-1618, 2014 WL 6863506, at *7 (M.D. Fla.
 8 Nov. 18, 2014) (holding payment processor provided “substantial assistance” “as a
 9 matter of law” although the misrepresentations occurred before victims payments
 10 were processed), *appeal docketed*, No. 11-11500 (11th Cir. Apr. 8, 2015).

11 **B. Lake’s Actions Caused Substantial Injury.**

12 Even assuming (incorrectly) that 12 C.F.R. § 1015.6 contains an implied
 13 causation requirement, Lake caused substantial injury by helping keep victims
 14 making payments he knew HOPE Services would steal. Notably, the new
 15 evidence presented above confirms the evidence set forth in our opening brief. *See*
 16 TRO Mem. at 38-39. For instance, the opening brief established that Lake
 17 informed one victim (Wofford) that, if she “made [her] three trial payments, they
 18 would make [her] modification permanent.”²¹ *Id.* at 33 (quoting Wofford ¶19).
 19 Lake’s opposition conspicuously fails to address the evidence the FTC’s opening
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25 ²¹ A Lake employee also called Wofford and asked her to “make the third
 26 and final trial payment so that [she] could get a permanent loan modification.”
 27 TRO Mem. at 33 (quoting Wofford ¶33). This is consistent with what another
 28 Lake employee told the FTC’s undercover investigator about her HOPE Services
 payments on a recorded call: “[Y]ou need to keep doing what you’re doing with
 [HOPE Services], okay?” TRO Mem. at 34 (citing Ostrum ¶92:41 at 475). Again,
 Lake’s Opposition does not address this evidence.

1 brief presents. In short, even assuming (erroneously) that 12 C.F.R. § 1015.6
2 requires causation, Lake caused substantial injury.²²

3 **II. The Asset Freeze Is Necessary and Appropriate.**

4 **A. “Comparative Culpability” Is Irrelevant to the Asset Freeze.**

5 Lake contends that the Court should modify its asset freeze to reflect his
6 “comparative culpability.” However, “comparative culpability” is irrelevant to
7 whether an asset freeze is necessary—the likelihood of liability and the need for
8 redress are the salient considerations. As the FTC explained, *see* TRO Mem. 24-
9 25, the court (1) “weighs the equities” and (2) “consider[s] the FTC’s likelihood of
10 ultimate success[.]” *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir.
11 1989). Both factors militate even more strongly in favor of preliminary relief now
12 than they did at the *ex parte* TRO stage. Lake now has counsel, which reduces the
13 private interest at risk with an *ex parte* proceeding, and he had roughly a month to
14 oppose this motion. Furthermore, the evidence against Lake is now even more
15 substantial than that presented at the TRO stage, when the Court properly found
16 sufficient evidence with respect to Lake’s liability to justify temporary relief.

17 Furthermore, because the FTC is highly likely to prevail, an asset freeze is
18 necessary to preserve the possibility of restitution for victims. *See* TRO Mem. at
19 47. Given Lake’s dishonesty, he cannot be trusted to voluntarily preserve assets he
20

21 ²² Lake also claims that “any offending conduct is not likely to continue.”
22 Opp. at 8. However, “an action for an injunction does not become moot merely
23 because the conduct complained of was terminated, if there is a **possibility** of
24 recurrence, since otherwise the defendant’s would be free to return to [their] old
25 ways.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999)
26 (quotation omitted) (emphasis added). Here, the relevant question is not whether
27 Lake will continue to conspire with the HOPE Defendants, but whether there is a
28 possibility that he will violate the regulations at issue in any respect. As the
Receiver notes, Lake is “a veteran loan modification operator.” DE64 at 12. He
also has connections throughout the “field,” including with Colleagues in Law and
the Barilla Law Firm. *See* TRO Mem. at 13 n.43. Based on these facts and the
evidence against Lake, there is a substantial risk that Lake will resume illegal loan
modification activities.

controls to repay his victims. Simply put, the facts and the law strongly support continuing the asset freeze. The fact that Pacios might have more “comparative culpability” is legally irrelevant.²³

B. Lake’s Other Asset Freeze-Related Arguments Are Meritless.

1. Allowing Lake to Incur Debt Will Injure Third Parties.

Lake also argues that the Court should narrow the asset freeze to allow Lake to incur unsecured debt, such as credit card debt or unsecured personal loans. Opp. at 10-12. As the Court is aware, however, the FTC has already agreed once (and would agree again) to allow Lake to receive unsecured personal loans to fund his defense or living expenses if there are appropriate assurances that the money Lake receives is from a properly-informed, independent third party. *See* DE57-58. However, the problem with credit card debt is that Lake currently has no ability to repay it, and the Court (in equity) has a duty to fashion relief that does not unduly burden third parties (such as Lake’s credit card company). If Lake demonstrates that funds he would use to repay new unsecured debt come from assets that are not frozen (such as earnings from future employment), then the FTC would agree that Lake can incur unsecured debt to the extent of those new assets. Without such an additional constraint, however, the Court should not modify the asset freeze.

2. Joint and Several Liability Is the Correct Standard.

Lake also argues that he is not jointly and severally liable. Opp. at 13-14. However, joint and several liability is the correct standard for three reasons. First, any MARS Rule violation is deemed to violate the FTC Act,²⁴ and courts have

²³ Lake cites no authority for the proposition that the Court should consider “comparative culpability” when determining whether to continue the asset freeze. This is unsurprising because what matters is whether Lake is liable, not whether other parties (such as the HOPE Defendants) are also liable for the same injuries.

²⁴ A violation of the MARS Rule constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act. *See* 12 U.S.C. § 5538; 15 U.S.C. § 57a(d)(3).

1 authority to hold defendants jointly and severally liable under the FTC Act. *See*,
 2 *e.g.*, *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007)
 3 (holding FTC Act violators “jointly and severally liable for the total amount of
 4 consumer injury”); *FTC v. Sharp*, 782 F. Supp. 1445, 1453 (D. Nev. 1991) (same).
 5 In fact, the only court to consider this issue in the context of an “assisting and
 6 facilitating” claim held the defendant jointly and severally liable. *See FTC v. HES*
 7 *Merch. Servs.*, No. 6:12-CV-1618, 2015 WL 916349, at *1 (M.D. Fla. Feb. 11,
 8 2015), *appeal docketed*, No. 11-11500 (11th Cir. Apr. 8, 2015). Indeed, in a case
 9 like this one—where Lake’s conduct was integral to the theft’s success—joint and
 10 several liability is particularly appropriate.

11 Second, the “assisting and facilitating” provision is a regulatory analogue to
 12 common law aiding and abetting—in fact, the claims have identical elements.²⁵
 13 Significantly, common law aiding and abetting allows for joint and several
 14 liability. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (“If the
 15 encouragement or assistance is a substantial factor in causing the resulting tort, the
 16 one giving it is himself a tortfeasor and is responsible for the consequences of the
 17 other’s act.”).²⁶ It makes no sense to allow defendants to escape with less liability
 18 because their deceitful act is a statutory or regulatory violation rather than a
 19 common law wrong. For this reason as well, joint and several liability is proper.
 20

21
 22 ²⁵ The MARS Rule’s “assisting and facilitating” provision requires (1) an
 23 underlying violation, (2) knowledge (or conscious avoidance of knowledge) of the
 24 violation, and (3) substantial assistance to the violator. *See* 12 C.F.R. §1015.6.
 25 Similarly, the RESTATEMENT (SECOND) OF TORTS § 876 addresses “persons acting
 26 in concert,” and subsection (b) outlines aiding and abetting. *See, e.g., Witzman v.*
Lehrman, Lehrman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (identifying §
 876(b) as stating the elements of aiding and abetting). Exactly like the MARS
 Rule, Section 876(b) requires an underlying violation, knowledge, and that the
 secondary tortfeasor “substantially assist or encourage the primary tortfeasor[.]”

27 ²⁶ *See also Reilly v. Anderson*, 727 N.W.2d 102, 107-12 (Iowa 2007) (noting
 28 that the RESTATEMENT provides that secondary tortfeasors found to aid and abet are
 jointly and severally liable).

1 Third, Lake concedes that “to avoid joint and several liability,” he “has the
2 burden of proving that the harm is capable of apportionment.” Opp. at 14 (citing
3 *Burlington Northern v. United States*, 556 U.S. 559, 614 (2009)). Lake fails to
4 satisfy this burden and, indeed, he does not even suggest how the Court might
5 apportion the harm.²⁷ For this reason as well, joint and several liability is proper.²⁸

6 3. Consumer Loss Is the Proper Redress Measure.

7 Finally, Lake argues that his liability should be capped at what he received
8 (\$800 per file). Opp. at 14. However, “equity requires the wrongdoer to restore
9 the victim to the *status quo*.” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 606 (9th Cir.
10 1993) (quotation omitted). This remains true in situations, like this one, where
11 “the loss suffered by the victim is greater than the unjust benefit received by the
12
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14
15 ²⁷ Lake’s request, addressed below, that the Court cap his liability at the
16 amount he received is not a suggested “apportionment” of the sort *Burlington*
17 *Northern* and the RESTATEMENT intend. Both sources speak to apportionment
18 based on the divisibility of contribution (for instance, one defendant might be 80%
19 responsible for an accident, and another 20%), not the tortfeasors’ relative gain
20 from the wrong. See *Burlington Northern*, 556 U.S. at 614 (discussing
21 RESTATEMENT § 433A and explaining that “apportionment is proper when “there is
a reasonable basis for determining the contribution of each cause to a single
harm”). Lake has not proposed an apportionment based on the Defendants’
relative contribution (nor could he, *see supra* n.28), and therefore, he has not met
his burden to avoid joint and several liability.

22 ²⁸ Lake further concedes that “apportionment is inappropriate in cases where
the harm is not capable of reasonable, logical, or practical division.” Opp. at 14.
23 (citing the commentary to RESTATEMENT § 433A). Here, the harm is impossible to
24 apportion. Depending on when they realized the fraud, victims made between one
and four payments over months. Although Lake’s interaction with victims
followed general patterns, his role with respect to each individual victim was
25 unique. Thus, although Lake substantially assisted the entire fraud, exactly how he
affected individual victims varied. It is also impossible to sever Lake’s role from
26 even the victim’s first payment, because if he had disclosed the fraud immediately,
in some cases, the victim might have recovered funds. Additionally, had Lake
27 disclosed the fraud to enough victims, the entire scam might have collapsed more
quickly, thereby preventing many victims from losing even their first payment. In
28 short, any sort of simple apportionment is impossible.

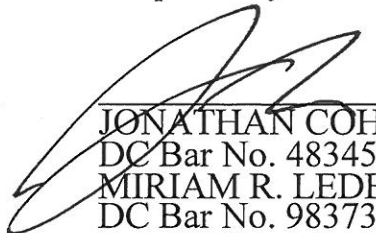
defendant.” *Id.* (citation omitted).²⁹ Given the egregious nature of the wrongs this case involves and Lake’s active, deliberate contribution to the theft, equity demands that consumer loss is the proper redress measure.³⁰

CONCLUSION

For all the aforementioned reasons, the FTC asks the Court to enter the proposed Preliminary Injunction against Lake.

Respectfully submitted,

Dated: 5/11/15


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²⁹ See also *FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009) (“[B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant’s profits. . . . We conclude that the district court did not abuse its discretion by holding the defendants liable for the full amount of loss incurred by consumers.”).

³⁰ Notably, Lake’s frozen assets are a mere fraction of the amount he owes, however one measures it. Put differently, determining how to measure Lake’s redress liability is immaterial to the asset freeze because there is no theory pursuant to which Lake’s frozen assets would exceed his liability. Specifically, the FTC estimated 432 victims as of mid-February, and approximated 485 victims by mid-April, when the Temporary Receiver halted operations. See TRO Mem. at 2 n.2. Even ignoring *Figgie* and *Stefanchik*, and assuming incorrectly that Lake is only responsible for \$800 per victim, that still amounts to \$385,600. The Receiver reports that approximately \$16,000 of Lake’s assets are frozen, see DE64 at 4, but he may have inadvertently omitted one account with approximately \$44,000, for a total of around \$60,000. However, even considering other assets Lake may have, his total assets fall far short of even the most generous view of his potential liability.

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CERTIFICATE OF SERVICE

I, Miriam Lederer, certify that I am over the age of 18 and am employed by the Federal Trade Commission. My business address is 600 Pennsylvania Avenue, N.W., CC-9528, Washington, D.C. 20580. On May 11, 2015, I caused the following document to be served: Plaintiff's Reply in Support of a Preliminary Injunction Against Defendant Denny Lake. I served the following individuals:

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1 I declare under penalty of perjury that the foregoing is true and correct.

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12 Executed in Washington, D.C.

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